Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-~~.....~~ 77-301

GEORGE W. LEWIS, *et al.*,

Petitioners,

—v.—

WILLIAM F. HYLAND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FRANK ASKIN
Constitutional Litigation Clinic
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

BRUCE J. ENNIS
JOEL M. GORA
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	12
1. Certiorari Should be Granted to Clarify or Reconsider Rizzo v. Goode.....	14
A. In the Circumstances of This Case, Rizzo v. Goode Does Not Preclude Injunctive Relief	14
B. If Rizzo Does Preclude Injunctive Relief In The Circumstances of This Case, It is Inconsistent With The Congressional Intent in Enacting Section 1983, and Should Be Reconsidered	25
II. Certiorari Should Be Granted to Resolve A Conflict Between The Third and Second Circuits Regarding the Award of Damages	28
Conclusion	30

TABLES OF AUTHORITIES

Page

Cases

Allee v. Medrano, 416 U.S. 802 (1974) 24

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 28,29

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). 18

Crane Co. v. American Standard, Inc., 490 F. 2d 332 (1973) 14,29

Curtis v. Loether, 415 U.S. 189 (1974) 28,29

Dairy Queen v. Wood, 369 U.S. 469 (1962) 28

Estelle v. Gamble, ____ U.S. ____, 50 L. Ed. 2d 251 (1976) 21,28

Hills v. Gautreaux, 425 U.S. 284 (1976) 18

Louisiana v. United States, 380 U.S. 145 (1965) 18

Monroe v. Pape, 365 U.S. 167 (1961) 25,27

Rizzo v. Goode, 423 U.S. 362 (1976) ..... passim

Page

Shapiro v. Thompson, 394 U.S. 618, 642 (1969) 24

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971) 18

Trainor v. Hernandez, ____ U.S. ____, 52 L. Ed. 2d 486, 498 (1977) 25

United States v. Carolene Products, 304 U.S. 144, 152-153 (1938).. 24

United States v. Guest, 383 U.S. 745, 757 (1966) 24

Younger v. Harris, 401 U.S. 37, 44 (1971)..... 25

Constitutional Provisions

Fourth Amendment 6,9,20

Fourteenth Amendment 9

Statutes

28 U.S.C. §§1254(1) 2

28 U.S..C. §§1331 5

28 U.S.C. §§1343 5

42 U.S.C. 1983 16,25,27

Page

Other Authorities

Baker, Russell, New York Times, September 14, 1974 4

"Developments in the Law: Section 1983 and Federalism," 90 Harv. L. Rev. 133 (1977)..... 25,26

"Note," "Rizzo v. Goode: Federal Remedies for Police Misconduct," 62 Va. L. Rev., p. 1259 12

"Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size," 15 Duq. L. Rev. 49, ... 13

"The Supreme Court, 1975 Term", 90 Harv. L. Review 1, ... 12

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-

GEORGE W. LEWIS, et al.,

Petitioners,

v.

WILLIAM F. HYLAND, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered March 25, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is unreported and is set out in a separately bound appendix submitted herewith, at pp. 38a-51a. The District Court's supplemental letter-opinion dated Dec. 29, 1975, also unreported, is set out in the appendix at 122a-125a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 554 F. 2d 93 and is set out in the appendix at pp. 1a-35a.

An earlier Court of Appeals opinion, reversing the dismissal of the complaint and remanding for further proceedings, is reported at 446 F. 2d 1343, and is set out in the appendix at 130a-155a. The original District Court opinion is reported at 324 F. Supp. 1220, and is set out in the appendix at 159-168a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1977. (App. at p. 36a.) A timely application for an extension of time in which to file a petition for a writ of certiorari was granted by Mr. Justice Brennan on May 31, 1977, extending the time for filing this petition to and including August 22, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether this Court's decision in Rizzo v. Goode, 423 U.S. 362 (1976), prohibits a federal court from enjoining state police supervisory officials, even though the court found:
   (a) that the defendant supervisory officials demonstrated "official indifference";
   (b) in the face of "numerous violations of the constitutional rights" of a discrete and readily identifiable class of long-haired interstate highway travelers subjected solely because of their personal appearance to repeated and unconstitutional searches;
   (c) by their subordinates, defendant state troopers, who had demonstrated "callous indifference for the rights of citizens"; and even though
   (d) the burdened class had no effective way to protect their constitutional rights other than to seek judicial relief?

2. Whether the District Court had discretion to award monetary damages in lieu of injunctive relief to victims of flagrantly unconstitutional police searches where the Complaint, although not specifically including a prayer for damages, included a prayer for such other relief as the Court deemed just and proper, and the court concluded after final hearing that it could not grant injunctive relief?

STATEMENT OF THE CASE

Almost seven years ago, the petitioners filed this suit to curb the notorious[1] practice of the New Jersey State Police of systematically stopping and searching vehicles occupied by "long-haired travelers" in the hope of finding marijuana or other illicit drugs.

In December 1970, thirty-seven individual plaintiffs filed a complaint in the United States District Court for the District of New Jersey, alleging in detail that they and other members of a class of "long-haired travelers"[2] had been subjected to arbitrary stops and unreasonable searches of their persons and vehicles by defendant New Jersey State Troopers solely because of plaintiffs' non-conformist personal appearance. The complaint further

1 Columnist Russell Baker commented in his New York Times Op-Ed page column of September 14, 1974, that "[m]iddle class whites caution their sons against driving the New Jersey Turnpike with long hair."

2 The plaintiffs have used the term "long-haired travelers" as a shorthand expression for a class of persons consisting of the named plaintiffs and all other persons of individualized appearance who have occasion to use the highways and toll roads of New Jersey, including persons with long hair or beards, or persons who in any other way manifest a non-conformist appearance.

charged that these unlawful searches were so numerous as to constitute a pattern or practice of conduct by defendant Troopers, and that this pattern violated plaintiffs' rights to be free of unreasonable searches, to due process, to equal protection of the laws, to freedom of association, to freedom of travel, and to privacy in matters of personal appearance. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Plaintiffs' complaint requested the following relief: 1) a declaratory judgment that defendants' pattern and practice of stopping and searching "long-haired travelers" was unconstitutional; 2) injunctive relief against defendants who engaged in such conduct directing them not to stop or search persons solely because of their personal appearance; 3) injunctive relief against supervisory personnel who were aware of such conduct directing them to order their subordinates not to stop or search persons solely because of their personal appearance; and 4) such other relief as the court deemed proper.

The District Court dismissed the complaint (324 F. Supp. 1220; 159a.). The Third Circuit reversed and remanded (466 F. 2d 1343; 130a. at 145a.):

> If the plaintiffs can establish that they are subjected to a deliberate pattern and practice of constitutional violations by the New Jersey State Troopers, we believe that they are entitled

to relief, and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures.

Following remand, the District Court resumed an evidentiary hearing that had been held in connection with an earlier motion for preliminary injunction. Plaintiffs presented 80 witnesses who testified to 66 separate highway incidents in which State Troopers stopped vehicles containing "long-haired travelers" and, in most instances, searched the occupants and/or the vehicles.

In addition to evidence of specific instances of illegal police searches, plaintiffs offered proof (through witnesses to incidents, expert witnesses and several members of the state police subpoenaed as hostile witnesses) that those specific incidents were merely examples of a general pattern and practice of police activity directed at long-haired travelers in the hope of finding marijuana or narcotics, without concern for the restrictions of the Fourth Amendment.[3]

---

3 Some troopers boasted about the practice. E.G., T. 1326-30; T373-7; T. 142 ("T.___" refers to the transcript of the hearing). Several plaintiffs were victimized on more than one occasion. See findings as to Greenblatt, 75a, 76a, 77a, and (FN 3 Continued on Next Page)

Plaintiffs produced further evidence that this general pattern and practice was known to, condoned, and even encouraged, by the supervisory officials of the State Police, including the Attorney General and the Superintendent of State Police. The supervisory officials failed and refused to control the lawless behavior of the troopers, refused to discipline troopers whose lawless acts pursuant to this pattern and practice were specifically called to their attention, and instead encouraged such acts by rewarding troopers whose unconstitutional acts resulted in discovery of marijuana or narcotics.

There is also evidence in the record that because of this unconstitutional pattern and practice, members of the plaintiff class were compelled to revise their travel habits, thus interfering with the fundamental right of interstate travel.[4]

The case was not finally decided on

(FN 3 Continued)
118a; Hergenhan, 54a, 55a, 83a; Warsager, 60a, 61a; Fogel, 52a, 115a; Lewis, 89a, 115a; and Porter, 82a, 116a.

4 T. 145; T.146-47; T.195; T.206; T.212; T.270-73; T.366; T.377; T.377-78; T.387; T.411; T.473; T.496; T.524; T.573-79; T.742; T.773; T.806; T.875; T.890; T.895.

the merits until November 1975.[5] It was decided by District Judge Meanor, on the basis of transcripts of the evidence heard by a different judge three years earlier, as supplemented by depositions taken in January 1974.[6]

---

5 The reason for the delay is that the District Judge to whom the case was initially assigned and who presided at the trial died before deciding the case, as did the judge to whom it was thereafter reassigned. A third judge retired before entering a decision.

6 Plaintiffs and defendants stipulated that the court was to decide the case based on the record already completed. Plaintiffs were not permitted to update the record. The court below noted that the district court had found no "substantial threat" of future violations by state troopers since "the passage of time, a general acceptance of diverse life-stypes and appearances and the threat of litigation were all accorded a beneficial effect." 9a-10a. That finding was improper both because of the stipulations of the parties concerning the record, and because plaintiffs had made an offer of proof to the trial court alleging continuation of the police practice, and had specifically sought an evidentiary hearing on that issue in their Motion for Reconsideration following the issuance of the trial court's findings. Rather than permit a hearing as to the continuing nature of the police patterns or practice, the
(FN 6 Continued on Next Page)

Judge Meanor attached to his opinion an Appendix with specific findings about the 66 separate highway incidents about which plaintiffs produced evidence. 52a. He found that of the 66 incidents, "35 have been found to involve clear violations of Fourth and Fourteenth Amendment rights" and further found "that a relatively small number of those whose rights were violated were represented before the court." 47a. Despite these findings, Judge Meanor refused to grant plaintiffs any injunctive relief, either against individual troopers or against supervisory personnel. Instead, he ruled that plaintiffs whose rights were violated could apply to the court within 30 days for hearings to assess money damages "where legally possible." 51a. Solely because he denied injunctive relief to the named plaintiffs, Judge Meanor held that the

---

(FN 6 Continued)
trial judge abandoned his reliance on the alleged discontinuance of the practice as a rationale for denying relief and in the Order and Final Judgment specifically stated that "even if such matters [of discontinuance of the practice] were incorrectly noticed, it is specifically held that such error would have no effect upon the ruling by this Court on plaintiffs' demand for relief." 126a. If the Court of Appeals intended, in upholding the trial court, to place any reliance on the alleged finding of discontinuance of the practice, it overlooked the trial court's own disavowal of such reliance.

class action motion was moot.[7]

The District Court's denial of injunctive relief against supervisory defendants was apparently based on the court's belief that such relief could not be granted unless the supervisory defendants "deliberately" and intentionally directed the unconstitutional acts. 47a.

Nine plaintiffs alleged that they could identify the individual troopers who violated their constitutional rights, and requested damages against those defendants.[8] By a supplemental letter-opinion 122a., Judge Meanor awarded damages ranging from $100 to $250 in favor of four plaintiffs and against three defendants. On January 14, 1976, the court entered an Order and Final Judgment (125a.)

The plaintiffs appealed from that portion of the judgment which denied injunctive relief and the defendants cross-appealed from the award of monetary damages. The Court of Appeals issued its decision

---

7 Earlier, the court had indicated that class action status would otherwise have been appropriate. In fact, the court had stated: "If you win, you have a class." Transcript, October 29, 1974 hearing, p. 10.

8 Many of the plaintiff class could not identify the individuals who violated their constitutional rights, and for that reason did not even apply for damages.

and Judgment on March 25, 1977 (Lewis v. Hyland, 554 F. 2d 93; 1a; 36a), affirming the denial of injunctive relief and reversing the award of damages.

The Court acknowledged that plaintiffs had "substantiated (and, indeed, augmented) their initial allegations." 29a. It held that "The district court's extensive findings of fact reveal what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads." 29a. And the Court observed:

> Were it not for the Supreme Court's opinion in Rizzo v. Goode, 423 U.S. 362, 46 S. Ct. 598, 46 L. Ed. 2d 561 (1976), which was announced after the district court proceedings had been concluded, our original mandate in this case, see 446 F. 2d at 1350, supra, would have required that we reverse the district court's denial of injunctive relief in light of plaintiffs' demonstration of numerous violations of their constitutional rights. (2a-3a. footnote deleted).

The court concluded, however, that this Court's opinion in Rizzo "has changed the operative standards", 17a, as they had existed at the time of the Circuit's original opinion in 1971.

The Court of Appeals reversed the award of damages on the sole ground that the prayer for relief in the original complaint did not specifically request

monetary damages, and that the thrust of the case was a request for injunctive relief.

REASONS FOR GRANTING THE WRIT

This case presents an excellent opportunity, on a well-developed factual record, to clarify the meaning and scope of this Court's decision in Rizzo v. Goode, 423 U.S. 362 (1976). That decision has puzzled both courts and commentators[9] and has caused considerable confusion

9 The Harvard Law Review, for example, noted that it was possible to read the sweeping language of Rizzo in such a way that it "would render nugatory the role of the federal judiciary as a guarantor of basic federal rights against state abuse." The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 246. That is precisely how the court below read Rizzo. But the Harvard commentary went on to observe that it was quite possible that the sweeping language "was merely an unfortunate rhetorical flourish." Ibid.

A note in the Virginia Law Review, which called the result in Rizzo "sound," went on to comment: "What is disturbing about the case is that, in its haste to reject the relief granted by the lower court in Rizzo, the Court has erected a barrier to far less intrusive remedies." "Note," Rizzo v. Goode: Federal Remedies for Police Misconduct," 62 Va. L. Rev.
(FN 9 Continued on Next Page)

among federal appellate courts, as the decision below so clearly indicates. Thousands of hours of legal and judicial time have been spent in an effort--to date futile--to understand and apply the Rizzo standards in a coherent and consistent manner. By clarifying Rizzo, this Court would eliminate the inconsistent standards now applied in different circuits, and would free badly needed legal and judicial resources.

(FN 9 Continued)
1259, 1283 (1976):

> "The Court spoke of equitable restraint and federalism in sweeping terms, leaving to future discussion a delineation of the permissible scope of federal injunctive relief against state officials. In the absence of limits rooted in the language of the decision, lower courts have been forced to surmise what kinds of discretionary relief remains for them to grant."

Simiarly, a comment in the Duquesne Law Review stated:

> "Whether Rizzo is read narrowly or broadly by the lower courts will largely determine its impact on future section 1983 litigation in the federal courts." "Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size," 15 Duq. L. Rev. 49, 63.

Certiorari should also be granted because the opinion of the Court of Appeals is inconsistent with and undermines the historic role of the federal courts in protecting the fundamental rights of discrete and readily identifiable minorities from abuse by state officers.

Moreover, the Circuit's reversal of the District Court's grant of monetary damages to several of the named plaintiffs against the State Troopers who violated their rights is in direct conflict with the decision of the Second Circuit in Crane Co. v. American Standard, Inc., 490 F. 2d 332 (1973). This Court should resolve that conflict over the power of a federal equity court to award monetary damages where it finds injunctive relief inappropriate or unavilable.

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY OR RECONSIDER RIZZO V. GOODE.

A. In the Circumstances of This Case, Rizzo v. Goode Does Not Preclude Injunctive Relief.

In its first opinion, the Third Circuit ruled that "the complaint set forth facts which, if proved, would justify a federal equitable remedy" (2a). In its second opinion, the Third Circuit acknowledged that "Plaintiffs have now substantiated (and, indeed augmented) their initial allegations" (2a). Nevertheless, the court felt compelled to deny relief

because of the intervening decision in Rizzo v. Goode:

> Were it not for the Supreme Court's opinion in Rizzo v. Goode... which was announced after the district court proceedings had been concluded, our original mandate in this case, see 446 F. 2d at 1350, supra,would have required that we reverse the district court's denial of injunctive relief in light of plaintiffs' demonstration of numerous violations of their constitutional rights. (2a-3a;).

Because of its view that "the Rizzo Court has changed the operative standards" 17a, the Circuit's opinion concluded that "the record of law enforcement abuses as it appears in this case--dismaying as it is--will not support federal injunctive relief." 3a.

The Third Circuit ruled that Rizzo precludes injunctive relief against supervisory officials absent proof of their "participation...in a plan or scheme to suppress constitutional rights," of proof that they "adopted and enforced" an "unconstitutional policy or plan." 14a. Under that standard, injunctive relief would not lie against a supervisory official who a) had knowledge of specific and repeated unconstitutional acts by subordinates, b) had the authority to control such acts and c) did nothing to control such acts. In fact, the Third Circuit believed that Rizzo precluded injunctive relief even though the "evidence

here demonstrated...insensitivity on the part of responsible officials toward reports of abuses by individual Troopers," and even though their "apparent obliviousness to citizens' complaints reinforces an impression of official indifference." 22a-23a. That is an unnecessary and overbroad reading of Rizzo which, if upheld, would effectively nullify the ability of federal equity courts to enforce the Civil Rights Act, 42 U.S.C. 1983, and to control invasions of constitutional rights by state officials.

As we will document infra, the facts of this case are substantially different from the facts in Rizzo in at least five important respects:

1. In Rizzo, the individuals who actually committed the unconstitutional acts were not defendants. Here, the court found that named defendants committed unconstitutional acts.

2. In Rizzo, the unconstitutional acts were random acts of violence, and were not directed at any identifiable class of persons. Here, there was substantial evidence, including admissions by individual defendants, that cars were stopped and searched not at random, but solely because their occupants were readily identifiable as "long-haired travelers."

3. In Rizzo, the possibility of future harm to the named plaintiffs was entirely speculative. Here, several plaintiffs were stopped and searched on more than one occasion and there was

reason to believe, since they continued to wear long hair and continued to use the highways, that they might be stopped again.

4. In Rizzo, there was no evidence that supervisory officials had actual knowledge of specific unconstitutional acts by their subordinates; at most, they were aware of a "statistical pattern" of abuse. Here, there was substantial evidence that supervisory officials either had actual knowledge of specific unconstitutional acts, or were "indifferent" and "oblivous" to such acts, and further evidence that they condoned or encouraged such acts by commending subordinates who committed them.

5. In Rizzo, the court had issued a broad injunction that would have required the defendants to devise new complaint procedures and to restructure their operations. Here, the court could have issued a narrow injunction simply directing Troopers not to stop or search cars solely because of the personal appearance of their occupants, and directing supervisory officials to order their subordinates not to stop or search cars solely because of the personal appearance of their occupants. That injunction, had it issued, would not have unduly interfered with the operation of the State Police Department.

Given these substantial differences, the Third Circuit's belief that Rizzo precluded injunctive relief was unwarranted.

1. Unlike Rizzo, in which the police officials who actually committed unconstitutional acts were not named as defendants, the unconstitutional acts found in this case were all committed by state troopers who were either named as defendants or identified in the complaint as John Doe's. In Rizzo, plaintiffs could show no violations of their constitutional rights by any party to the proceeding. But this case presents a far different question: the reach of a federal court's equity power to shape an effective remedy when specific constitutional violations have been proven against named defendants. Cf., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971), and Hills v. Gautreaux, 425 U.S. 284, (1976). The decision below is inconsistent with many historic decisions of this Court requiring injunctive relief to run against the only parties capable of providing full relief in the face of proven constitutional violations by persons in a subordinate or agency relationship. See, e.g., Burton v. Wilmington Parking Authority, 363 U.S. 715 (1961). Cf., Louisiana v. United States, 380 U.S. 145 (1965) (affirming injunctive relief against members of the State Board of Registration and the Director-Secretary of the Board of Registration although the actual violations of rights were caused by the parish voting registrars). This Court should clarify whether Rizzo precludes equitable relief when the constitutional violations proved against named defendants can only be effectively redressed by fashioning an injunction against supervisory officials.

2. In Rizzo, the plaintiffs had

proved 16 instances of violations of constitutional rights by Philadelphia police over a period of a year. There was no particular pattern or character to those violations. Any citizen could have been a victim. This record, on the contrary, shows a very specific pattern of unconstitutional vehicular searches focused on "discrete classes of travelers" 2a. Here, the District Court found 35 specific instances of unconstitutional searches which fit that pattern, and found further that "a relatively small number of those whose rights were violated were represented before the court" 47a.

Here, individual Troopers admitted that they single out long-haired travelers for searches, based apparently upon their belief that long-haired travelers, as a class, would be more likely to possess marijuana or narcotics than would short-haired travelers. For example, one Trooper admitted he had stopped a plaintiff "because he had long hair..." 56a. Another Trooper justified a search by saying to a driver, "You know as well as I that a lot of people who look like you do things that are wrong" 77a. Another Trooper, when asked why he had stopped the car, replied "Well, we do these things, especially when you have somebody with long hair sitting in the car." 116a. Another Trooper not only stopped and searched travelers because of their personal appearance, but even ordered them "not to come back here again" because he "didn't like the way [they] looked" 70a.

Individual Troopers also admitted that they would search long-haired travelers even if such searches were unconstitutional. One Trooper, for example,

said "It is much more important to us that we stop crime than that we observe the Fourth Amendment" 52a. Another Trooper, embarrassed when a law student questioned the constitutionality of a search, "mumbled something to the effect that it was, after all, his job to harass people" 64a.

3. Unlike the Rizzo plaintiffs, who could make only attenuated and speculative allegations of threatened future harm, members of the plaintiff class are under constant threat of being victimized again by the defendants' illegal practices, both because of the widespread nature of defendants' activities and because of the narrowness and readily identifiable nature of the plaintiff class. Thus, Ronald Greenblatt, whose unusually long hair and distinctive beard won him a role as Jesus Christ in a television network documentary (T1606), was stopped by six different Troopers on five different occasions, in little more than a year. On one day, he was stopped by two different Troopers. 76a. The trial judge found that these stops involved three illegal searches and a fourth "unconsummated" search. 118a. Plaintiff Hergenhan was stopped three times (54a, 55a-83a), plaintiff Warsager was stopped twice (60a, 61a), as was plaintiff Porter (82a, and 116a), plaintiff Fogel (52a. and 115a), and plaintiff Lewis (89a and 155a). This record indicates that plaintiffs' concern about future searches is reasonable, and is not based on mere speculation. This case thus poses, as Rizzo did not, the question of federal

court power to enjoin future constitutional violations.[10]

4. In Rizzo, the sole allegation against the superior officers was their inaction in the face of a series of random police assaults on citizens. This case presents a far different situation. The record in this case shows a deliberate pattern of police behavior, pursuant to official state policy (to curb narcotics traffic), to focus on a particular group of readily identifiable highway travelers in the hope of finding marijuana or narcotics. Rather than demonstrating mere inaction by supervisors, this record contains evidence of supervisory conduct that can fairly be described as active encouragement of the troopers' unconstitutional behavior, or at the least, "deliberate indifference."[11] As the Court of Appeals acknowledged,

> This insensitivity extended in several instances to departmental awards being conferred upon individual Troopers, named as defendants here, for their performance during the very time in which they instituted flagrantly illegal searches. 22a.

---

10 It is possible to read Rizzo as based on the absence of a justiciable case or controversy. Under that reading, parts II B and C of the opinion would be dicta, with no precedential value.

11 See Estelle v. Gamble, ____ U.S. ____, 50 L. Ed. 2d 251 (1976).

For example, the State Police exonerated defendant Trooper Kowal after investigation of a citizen's complaint about an illegal search, on the ground that Kowal had been very successful in uncovering narcotics in the course of motor vehicle searches. Ignoring overwhelming evidence of his illegal behavior (which Judge Meanor found was unconstitutional, 100a-102a), the State Police dismissed the complaint against Kowal because of an investigator's report that:

> Trooper Kowal has been very active in narcotic violation enforcement... as a result of vehicle checks...He apparently does know what to look for, and further, recognizes same when he has found it. (Exhibit P32, p. 3, ¶10.)

As the District Court found, "Trooper Kowal received no reprimand..Instead, he received a commendation for his law enforcement activity during May and June 1971." 101a. That was the same period during which Trooper Kowal engaged in at least two unconstitutional searches. See 100a-102a, and 111a-112a.

Immediately after being searched by a Trooper, one plaintiff described the incident to a supervisory official, Colonel Kelly, and asked if it was "policy" to "systematically stop and search people with long hair..." 66a. Although denying such a policy, Col. Kelly indicated he was aware that Troopers were hostile and "antagonistic" to "students" and other

long-haired travelers, and thought it "only natural" for Troopers to search such people. 66a.

Other specific constitutional violations were brought to the attention of supervisory officials (see 70a-71a, and 89a, for example), but those officials did absolutely nothing to prevent or discourage such violations.

5. Rizzo was based in large part on the Court's reluctance to approve broad interference with police department operations. An appropriate injunction in this case, however, would not have required broad interference with the operations of the New Jersey State Police. A simple notification from superiors to subordinates that they could not constitutionally stop and search vehicles solely because of the personal appearance of the occupants would not unduly tie the hands of the State Police.

Furthermore, insofar as the Court's reluctance to approve injunctive relief against police officials was based on more general notions of federalism and comity, those notions should carry far less weight in this case than in Rizzo, because the acts complained of in this case directly affect the "fundamental" right of interstate travel.

Unlike Rizzo, this case involved citizens who have been deprived not only of their Due Process right to be free from illegal searches and seizures, but also of their fundamental right to travel

freely from state to state. United States v. Guest, 383 U.S. 745, 757 (1966). And because many travelers are not citizens of New Jersey, they have no recourse other than the judicial process. In Rizzo, the plaintiff class was coextensive with the electorate of the City of Philadelphia. Because the electorate has at least theoretical control over the activities of their duly elected officials, deference by a federal court to the independent and democratic workings of local electoral processes may, in some cases, be warranted. But where the federal rights of a discrete and readily identifiable minority class are transgressed, and where many of the class are interstate travelers who cannot participate in the electoral process in New Jersey, such deference is inappropriate. See Allee v. Medrano, 416 U.S. 802 (1974). Cf., United States v. Carolene Products, 304 U.S. 144, 152-153 (1938).

This case is thus different from Rizzo because one of the rights being violated is the right of interstate travel, a right which it is the special responsibility of the federal courts to protect since, unlike most rights protected by the Due Process Clause of the 14th Amendment, its source is in "the nature of the federal union" itself. Shapiro v. Thompson, 394 U.S. 618, 642 (1969). Thus, considerations of comity, which were central to the Rizzo holding, are far more attenuated here. Since it is clear that "both federal and state interests [must be] taken into account" in the

comity calculus, Trainor v. Hernandez, ___ U.S. ___, 52 L. Ed. 2d 486, 498 (1977). (Blackmun, J., concurring), and since the concept requires "sensitivity to the legitimate interests of both State and National Governments," Younger v. Harris, 401 U.S. 37, 44 (1971), this Court should review the decision of the court below in order to safeguard the legitimate interests of the federal system.

B. If Rizzo Does Preclude Injunctive Relief In the Circumstances of This Case, It is Inconsistent With The Congressional Intent in Enacting Section 1983, And Should Be Reconsidered.

The legislative history of Section 1983 is described in detail in "Developments in the Law: Section 1983 and Federalism," 90 Harv. L. Rev. 1333 (1977) (hereafter "Developments"), particularly at pp. 1137-1156, and in Monroe v. Pape, 365 U.S. 167 (1961), and will not be repeated here. It is sufficient for present purposes to note that the central purpose of the Civil Rights Act of 1871 was to provide a federal remedy against state officials because of their "inaction" or "toleration of private lawlessness":

> "Atrocities committed by the Ku Klux Klan, however, led Congress in the Act of 1871 to provide civil rights protection against official inaction and the toleration of private lawlessness." Developments, supra, at 1153.

****

"Moreover, most Congressmen viewed the situation in the South as exacerbated by the inaction of the state and local governments. A full reading of the debates compels the conclusion that the Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages. Thus, Representative, later President, Garfield of Ohio asserted that the problem in the South was not unequal laws, 'but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection...' " Developments, supra, at 1154 [footnote omitted].

If Congress intended to provide a remedy against state officials who do nothing to prevent unconstitutional acts by private persons (the Klan), it must follow that Congress intended to provide a remedy against state officials who do nothing to prevent unconstitutional acts by their own subordinates. To the extent Rizzo would preclude such relief, it is inconsistent with Congressional intent, and should be reconsidered:

"While the issuance of broad structural relief in 1983 actions is a relatively modern phenomenon, the concern for breakdowns in state governmental systems is one that

traces back to the Civil Rights Act of 1871. It was not simply affirmative state action in support of the activity and conduct of the Ku Klux Klan that motivated the enactment of section 1983 in its original form but also the specter of state systems unwilling or unable to act in the face of massive violations of constitutional rights. The Court's suggestions in Rizzo v. Goode, that a finding of liability is inappropriate when supervisory officials do not affirmatively implement an unconstitutional policy, however, has the potential to undermine section 1983's effectiveness as a means of dealing with systemic breakdowns. Given the governmental immunity established by Monroe and City of Kenosha, system-wide injunctive relief, to be effective, must generally be directed at individuals at a high level of the governmental organization. A requirement of proof of deliberate and calculated infringement on the part of these officials may well be difficult to meet, but it is hard to see why this should matter. In the context of damage actions, proof of the individual's blameworthiness is relevant because of a concern for the effectiveness and fairness of imposing on him an obligation to pay damages to the plaintiff. Where the remedy sought is injunctive relief to prevent future deprivations or to undo the effects of past ones, however, the individual defendant

is essentially a representative of the system. The real issue in such cases is the functioning of the system as a whole, not the actions of any particular official. Moreover, if personal fault were considered determinative, the legislative history of section 1983 as well as the 'deliberate indifference' standard established in Estelle v. Gamble, which was decided after Rizzo, would seem to support a finding that a responsible official who ignores a pattern of injuries--even if only negligently inflicted and certainly if done intentionally--is himself fairly deemed 'at fault.'" Developments, supra, at 1229 [footnotes omitted].

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE THIRD AND SECOND CIRCUITS REGARDING THE AWARD OF DAMAGES.

When the District Court decided that it could not fashion injunctive relief to redress the clear and flagrant constitutional violations it found had been committed, it decided to award monetary damages to several of the search victims. The Court of Appeals reversed that determination, relying on a recent series of decisions of this Court to the effect that "legal" relief may not be awarded by a federal court "incidental" to an equitable action. Curtis v. Loether, 415 U.S. 189 (1974); Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v.

Westover, 359 U.S. 500 (1959).

Although the cases cited do support that proposition, all of them involved plaintiffs who initially sought both legal and equitable relief. This Court has never decided whether a federal equity court, following a hearing, may award money damages in lieu of an injunction when it determines that it cannot properly fashion injunction relief.

On that issue, the opinion of the Second Circuit in Crane Co. v. American Standard, Inc., is directly contrary to the conclusion of the Third Circuit in this case. In Crane, the Second Circuit declined to read the Beacon line of cases as "requiring a judge to relinquish to a jury the shaping of relief in an action that was properly begun and tried solely as a suit in equity for injunctive relief simply because subsequent events may have put a whiff of money in the air." 490 F. 2d at 345. In Curtis v. Loether, supra, this Court observed that it would not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief." 415 U.S. at 196.

This Court should grant certiorari to review and resolve the conflict between the Second and Third Circuits on this issue of the Court's power to award money damages in an equitable action.

CONCLUSION.

The Petition for Certiorari Should Be Granted.

Frank Askin
Constitutional Litigation Clinic
Rutgers University Law School
180 University Avenue
Newark, New Jersey 07102

Bruce J. Ennis
Joel M. Gora
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioners

August 1977